1357

IN THE COURT OF APPEAL OF NEW ZEALAND C.A.25/76

BETWEEN THE HAWKE'S BAY FARMERS CO-OPERATIVE ASSOCIATION LIMITED

Appellant

A N D RODNEY GORDON THOMPSON

First Respondent

A N D KEITH LOYE LIMITED

Second Respondent

A N D PETER CHARLES OLSEN

Third Respondent

Coram - Woodhouse J.
Richardson J.
Quilliam J.

Hearing - 8 March 1978

Counsel - A.K. Monagan for Appellant
R.G. Gallen for First Respondent
A.P. Walsh for Second Respondent

Judgment - 8 March 1978

ORAL JUDGMENT OF THE COURT DELIVERED BY RICHARDSON J.

Rodney Gordon Thompson farms a number of parcels of land in the Paki Paki area, Hawke's Bay. In the spring of 1973 he planted a fifteen acre paddock in rye grass intending to harvest rye grass seed. One day, early in September 1973, in his absence and without his authority, one, Jim Peni, an employee of Keith Loye Limited, a company engaged in the business of agricultural spraying on a contract basis, applied "Herbitol" spray to the paddock. The result was disastrous. The rye grass was completely killed. Appropriate steps were taken by all concerned to minimise the loss to Mr Thompson and the quantum of that loss is agreed and is not in issue.

What had happened was that Kevin Ruston Murphy, a produce agent employed by The Hawke's Bay Farmers Co-operative Association Limited, a stock and station firm acting as agent for Peter Charles Olsen, a farmer client of the firm who had recently bought from Mr Thompson a sixteen acre parcel of land in that same area, engaged Keith Loye Limited to carry out weed spraying, intending that the latter company would spray the sixteen acre paddock which was in lucerne but infested with grass and weeds of various types. He gave Mr Loye a sketch or plan of the area, which he had drawn, showing the location of the paddock and its relationship to Anderson Road, Paki Paki and various other features. Mr Loye passed the plan on to Mr Peni who claimed that he relied on it when he came to spray and in the result sprayed the wrong paddock.

Mr Thompson sued Keith Loye Limited, The Hawke's Bay Farmers Co-operative Association Limited and Peter Charles Olsen alleging that the damage he had suffered was due to the negligence of each of the defendants. It was alleged against Keith Loye Limited that that company or an employee, without authorisation, negligently entered his land and sprayed the crop. The negligence alleged against The Hawke's Bay Farmers Co-operative Association Limited was that in instructing Keith Loye Limited it gave misleading instructions and, in particular, that the map provided for the direction of Keith Loye Limited was incorrectly drawn as to the location of the plaintiff's land. It was further alleged in the amended Statement of Claim that the first and/or second defendants, that is Keith Loye Limited and The Hawke's Bay Farmers Co-operative Association Limited, were

acting as agents for the third defendant, Peter Charles Olsen, and that in the circumstances the third defendant was responsible for the negligence of the first and/or second defendants.

At the trial of the action and after hearing lengthy evidence, Haslam J. gave judgment for the plaintiff against all three defendants. He held that the first defendant had been negligent in failing adequately to supervise its employee, Jim Peni, for whose conduct it was answerable in a number of respects to which he referred. So far as the second defendant was concerned, he found that, in the situation that applied, the stock and station firm was under a duty of care of the "neighbour" principle to client farmers to ensure that accurate, precise instructions for spraying operations of a kind in question were given and carried out, and, indeed, that the evidence in the case served to illustrate the high degree of risk that such an activity might entail. He went on to say that it was a reasonably foreseeable risk, after the issue by the appellant's agent of the sketch plan, that with or without fault on the part of the contractor, or of his driver if left to his own devices, the driver might spray the wrong field. As to the sketch plan itself, his finding was that the very detail in it indicated that some directions were required at the outset to direct the firm of contractors and that, whilst it was just a sketch run off in a hury for this purpose, unfortunately it had defects which were likely to mislead. After commenting on certain evidence given in that respect and referring particularly to the evidence of a Mr Shanley, a surveyor (to which we shall refer later in this judgment) he concluded that the contrast

and divergence between the sketch plan and the aerial photographs produced in evidence showed very clearly the potentially misleading quality of the sketch plan.

Turning to the position of the third defendant, Mr Olsen, he found that he was liable both vicariously and personally. He was under a duty of care to the plaintiff and there was a foreseeable risk, even so far as he was concerned, that a contractor might go to the wrong field. Having delegated the work to his agent, the second defendant, the third defendant was answerable for its negligence. Haslam J. went on to hold that, by permitting the stock and station firm, and directing them no doubt to engage the first defendant or whomsoever they nominated to carry out this job, the third defendant was permitting an operation to begin which, as a practical farmer, he must have known called for a high degree of care, caution and precision. And it is a necessary implication from his subsequent finding that the third defendant was personally responsible, as well as vicariously liable, that the trial judge found him to be negligent in failing to supervise and control the weed spraying operation adequately.

Following the announcement of the Court's finding as to liability, counsel for the second defendant advised the Court that the second defendant accepted full responsibility vis-a-vis the third defendant and would, in any event, indemnify the third defendant. Counsel for the first and second defendants then asked the Court to apportion responsibility as between them. Haslam J. concluded that the total liability should be borne entirely by the second defendant.

The first defendant has accepted the judgment in this case. The second defendant appealed and as appellant, advanced three broad submissions, namely:

(1) That the learned Judge was wrong in holding that the appellant was negligent in any degree and whether personally or vicariously.

(2) That the learned Judge was wrong in holding that the third respondent, that is Mr Olsen, was negligent in any degree whether personally or vicariously.

(3) That if negligence on the part of the appellant was the correct finding, then the opinion expressed by the learned Judge that the total liability to the first respondent, Mr Thompson, should be borne by the appellant, was wrong.

We propose to review quite briefly the evidence before the Supreme Court. Mr Thompson, the plaintiff, said in evidence that the land in question was difficult to describe to anyone because it was flat land and apart from a haybarn there were no buildings on his property. He said that he would insist that either he or his agent be present when there was spraying to be done. This was qualified in cross-examination but the thrust of his evidence was that, because of the nature of the spraying operation, that was a basic precaution that should ordinarily be taken. Mr Scott, a produce agent employed by Williams & Kettle Limited, confirmed Mr Thompson's view that either he or Mr Scott should be present to supervise spraying operations and broadly for the reasons that Mr Thompson gave. Then there was the evidence of Mr Shanley, a surveyor, to which the trial Judge attached particular weight. He had inspected the land and, when asked to comment on the suitability of the plan to identify the paddock, said "I found the plan was misleading and confusing once I tried to orientate myself." He went on to say that from memory it gave an angular variant of something like

thirty degrees from the correct alignment and the lucerne paddock was about a similar variation of alignment in the opposite direction. Then, referring to the lucerne paddock, he said that it was to his left and, that being the case, he did not see how it could have been parallel to Anderson Road as indicated on the plan. Referring to the haybarn, he observed that the boundary to the haybarn was pointing in the wrong direction by about thirty degrees and that is why he found it difficult. Finally he noted that the gate into the lucerne paddock was not in the position shown on the plan.

Mr Loye's evidence was that when he was instructed by Mr Murphy to do the job, he asked Mr Murphy whether there would be any difficulty in finding the paddock and if he (Mr Murphy) had marked the paddock with metal flags of a type which Mr Loye had supplied to the appellant. Mr Murphy said he would not have any difficulty in finding the paddock, which was a place that Mr Loye knew, and he described it, but he also said he would draw a plan, which he did. Subsequently Mr Loye went to the area with the plan and said in evidence "Had I been given that map I would have sprayed the same paddock as Jim Peni without a doubt." Now there was a conflict in a number of respects between the evidence given by Mr Loye and that given by Mr Murphy. Mr Monagan, for the appellant, carefully analysed and compared that evidence and submitted that the trial Judge's preference for the evidence of Mr Loye was not justified and that he did not take proper advantage of seeing and hearing the witnesses. We have considered the various points referred to by Mr Monagan and are entirely satisfied that the trial Judge, who was, of course, in a much better position to assess the

witnesses than we are, was entitled to prefer Mr Loye's account of events.

Mr Peni explained how he had used the plan when concluding that the paddock he sprayed was the one intended. Even after he learned of the mistake and went out again with the plan, he said "I still reckoned that was the right paddock I sprayed looking at the map." He was questioned at length as to his actions in spraying rye grass instead of lucerne. He said that he was told that the paddock he was supposed to spray had plenty of grass and he could not find any lucerne in it, but looking at the sketch plan he had not questioned the recommendation. He said it was not clear to him that the spray was being applied to very recently planted grass and that he did not know there was only grass in the paddock which he sprayed. On that same point Mr Loye, in addition to the evidence that had he been given the map he would have sprayed the same paddock, to which reference has already been made, said that the instructions he received were to spray a paddock of lucerne that was badly infested with grass and, with all his experience with lucerne, this was the worst infested paddock he had seen. He went on to say that when Mr Murphy gave him the plan, he (Mr Murphy) had said he was not sure if the lucerne in the paddock that was being sprayed would survive. We should add, however, that in cross-examination Mr Loye also agreed that, with his experience in the business, it would not have taken him long, if any time at all, to realise that he was not in a lucerne paddock. But, of course, he was a very experienced contractor in that respect.

Now the last witness was a Mr Ellen, an assessor. He said that using the sketch plan he had no difficulty in finding the lucerne paddock in about ten minutes. But notwithstanding Mr Monagan's submissions as to the weight to be given to his evidence, we consider that the trial judge was justified in observing, as he did:

> "He is used to finding sites and localities from partial, incomplete and inaccurate information and one would regard him in that field as an expert, in contrast to an ordinary tractor driver, or even a spraying contractor. Furthermore, Mr Ellen was alerted by knowing that some error had occurred here and therefore was doubly vigilant in ensuring that he went to the right paddock."

This is highlighted by the answer he gave to the question:

> "Did you turn the little plan given to you upside down to orientate yourself?"

which was:

> "Yes I did, it was the only way I could make sense of it."

It is well established that on an appeal of this kind the court does not substitute its view of the case for that of the trial judge. Rather, it is a matter of whether there was evidence justifying the conclusion reached by the trial judge. Given this evidence we consider that Haslam J. was entitled to make the findings of negligence against the appellant to which we have referred. The first step in his reasoning was that the appellant was under a duty of care of the "neighbour" principle to farmers in that district to ensure that accurate, precise instructions for such operations were given and carried out. The second step was his finding that in this case instructions were required to direct the contractor to the site. That was the reason

the plan was drawn and provided and he found that the plan had defects which were likely to mislead and did mislead. Those were findings the trial Judge was entitled to make on the evidence before him. In doing so he emphasised the evidence of the surveyor who, for the reasons he gave, found the plan misleading and it seems to us that Haslam J. was entitled to regard that as particularly cogent evidence. The third step in the reasoning was that it was a reasonably foreseeable risk after the issue of the sketch that, with or without fault on the part of the contractor, or his driver if left to his own devices, the driver might spray the wrong field. As to this Mr Monagan submitted that it was not reasonably foreseeable that the driver, Mr Peni, would be given so little instruction by Mr Loye before being sent to the job and that, while it was reasonably foreseeable that Mr Loye would delegate, it was not foreseeable that he would delegate without adequate instruction or without adequate supervision or to an incompetent employee. We are unable to agree. As the facts of this case emphasise, the engaging of weed spraying contractors involves a high degree of risk. There is a need for clear instructions so as to ensure correct identification of the area to be sprayed. The delegation of the spraying to an employee must have been foreseeable, in which case it must have been foreseeable that the sketch plan might be given to him to follow and whether or not that was accompanied by some further explanatory comments by the contractor, we consider that Haslam J. was entitled to conclude that the appellant should have foreseen that the contractor's employee might be misled and confused when he went to do the job, if the plan was inaccurate in significant respects. Finally, having regard to the evidence given by Mr Peni and Mr

Loye as to the state of the paddock that was to be sprayed, the fact that lucerne and rye grass are ordinarily clearly distinguishable, while one factor to be considered, was not of such over-riding significance in all the facts of this case to preclude the finding of the trial Judge that it should have been reasonably foreseeable to a person in the position of the appellant, that the contractor's employee, relying on the plan, might spray a paddock of rye grass.

In view of our conclusion that the Judge was entitled to find that the appellant was guilty of negligence causing or contributing to the loss the plaintiff suffered, it was agreed that it was not necessary for us to express any view on the second submission.

We turn to the third submission. It is necessary to have regard to the provisions of s.17 of the Law Reform Act 1936 conferring jurisdiction on a court to direct apportionment of a loss where there are two or more liable in respect of the same damage. The statutory mandate is that:

> "... the amount of the contribution recoverable from any person shall be such as may be found by the Court to be just and equitable having regard to the extent of that person's responsibility for the damage; and the Court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity."

The statutory criterion of what is "just and equitable" having regard to the extent of the particular defendant's responsibility for the damage, allows and requires a broad rather than a refined approach to the mode of apportionment. What is involved is a comparison in a realistic way of each defendant's responsibility for

the damage which in turn involves consideration of an amalgam of factors; the degree of fault or culpability contributing to the accident and as measured by the degree of departure from the standard of conduct exacted by law, the gravity of the risk created by the particular tortfeasor, and the degree to which his actions can be said to have caused the resulting injury. A great disparity in the relative shares in the responsibility does not preclude apportionment. But the just and equitable formula is sufficiently broad to allow in appropriate cases for the allocation of one hundred per cent of the responsibility to one joint tortfeasor. Moreover, the additional words of s.17(2) empowering the Court to exempt any person from liability to make contribution, expressly allows a tortfeasor to be exempted from liability to make contribution in an appropriate case. We should add that it was not contended before us that there was any jurisdictional bar to the course that Haslam J. had taken in this case. What was submitted was that in all the circumstances the allocation of one hundred per cent of the responsibility to the appellant was not proper. The trial Judge's conclusion on this aspect of the case is contained in the passage at the close of his judgment where he said:

> "I reach this result because I think that at the very most, the degree of fault of the first defendant is minimal in relation to the responsibility of the second defendant. In the conventional phrase, the hand of the wrongdoer lay heavily on the victim from the outset until the destruction of the crop. The issue of an apparently convincing plan to Mr Loye, whose knowledge of the area was general and not particular, led him to think that this was a realiable document. Therefore he felt safe in delegating the job to Mr Peni without any oversight of the spraying by himself, or

> some other party with accurate knowledge. I think that it could, in addition, be assumed that Mr Loye would delegate the task in such circumstances to one of his staff. Again, I accept the plaintiff's opinion that the destructiveness of this chemical when applied to the wrong area, calls for close supervision throughout until the job has been finished."

Mr Monagan for the appellant challenged that finding in a number of respects. Now it is well established that an Appeal Court will interfere with the apportionment made at a trial only where it is considered to be clearly wrong. In Owners of Steamship or Vessel "British Fame" v Owners of Steamship or Vessel "MacGregor" [1943] 1 All ER 33, Lord Wright said at p.35:

> "... it would require a very strong case to justify any such review of or interference with this matter of apportionment where the same view is taken of the law and facts. It is a question of the degree of fault, depending on a trained and expert judgment considering all the circumstances, and is different in essence from a mere finding of fact in the ordinary sense. It is a question not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations; it involves an individual choice or discretion, as to which there may well be differences of opinion by different minds. It is for that reason, I think, that the courts have warned an appellate court against interfering, save in very exceptional circumstances, with the judge's apportionment."

That approach has always been taken by this Court. It leads to the conclusion that the disparity or discrepancy between the trial judge's apportionment and what might clearly be contended for, must be great before an appeal court would be entitled to interfere. On our view of the matter it cannot be argued that there is such a disproportion in this case. We are satisfied that Haslam J. did not err in principle in his approach to the

question of apportionment and that in the exercise of his discretion he was entitled to stress, as he did, the gravity of the risk created by the appellant in providing a confusing plan and its over-riding effect in causing the loss that ensued, and to reach the conclusion that he did. Accordingly, we reject the third submission.

The appeal is dismissed. The first and second respondents are entitled to costs which we fix at $300 in each case together with disbursements.

Solicitors for Appellant:	Dowling Wacher & Co. Napier
Solicitors for First Respondent:	W.S. Bramwell & Grossman Hastings
Solicitors for Second Respondent:	Hallett Heath Walsh & Co. Hastings